

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

51067

FILE: B-184707

DATE: September 29, 1975

MATTER OF: Brooks-Berry-Haynie & Associates, Inc.

97399

## DIGEST:

Propriety of average annual receipts requirement for concern to be considered small business is not for determination by GAO since conclusive authority over that question as well as question of size status of low bidder is vested by statute in SBA.

Brooks-Berry-Haynie & Associates (Brooks) has protested the award of a contract to Acme Electric, Inc., under invitation for bids F09609-75-B-0137, issued for the replacement of airfield lighting at Dobbins Air Force Base, Georgia.

The solicitation was totally set aside for small business participation. The protester contends that the contracting officer erroneously has applied a small business size standard which would exclude firms with average annual receipts in excess of \$7,500,000. It is argued that since the advertised requirement was entirely for electrical work the contracting officer should have applied the \$2,000,000 average annual receipts criterion for electrical work. Under the latter criterion, protester believes that Acme is not a small business concern.

Brooks asks that this Office conduct a full and complete investigation of Acme's size status and also that this Office see to it that the \$2,000,000 size standard be applied to the contract in question as well as to all future electrical contracts.

Pursuant to 15 U.S.C. 637(b)(6), the Small Business Administration (SBA) is empowered to determine a business concern's size status for procurement purposes. Offices of the Government having procurement powers must accept as conclusive SBA's determination as to which concerns are to be designated small business. In discharge of this responsibility, SBA has promulgated regulations, which have the force and effect of law (Otis Steel Products Corps. v. United States, 161 Ct. Cl. 694 (1963)), found at part 121 of chapter I of CFR title 13.

Section 121.3-8, "Definition of small business for Government procurement," states in part that,

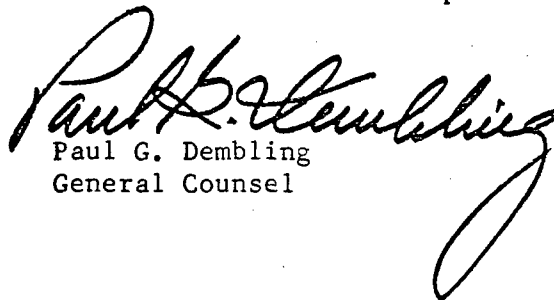
"\* \* \* The determination of the appropriate classification of a product or service shall be made by the contracting officer. Both classification and the applicable size standard (number of employees, average annual receipts, etc.) shall be set forth in the solicitation and such determination of the contracting officer shall be final unless appealed in the manner provided in section 121.3-6.\* \* \*"  
(Emphasis added.)

Section 121.3-6(a) provides that the Size Appeals Board shall review appeals from determinations made pursuant to section 121.3-8 and shall make final decisions as to whether such determinations should be affirmed, reversed, or modified. Section 121.3-6(b)(1)(iii) provides that an appeal may be filed with the Size Appeals Board by any concern or interested party which has been adversely affected by a decision of a contracting officer regarding classification. The time for filing an appeal is set forth in section 121.3-6(b)(3) (ii) which provides that:

"An appeal from a product classification determination by a contracting officer may be taken: (a) Not less than 10 days, exclusive of Saturdays, Sundays, and legal holidays, before bid opening day or deadline for submitting proposals or quotations, in cases wherein the bid opening date or last date to submit proposals or quotations is more than 30 days after the issuance of the invitation for bids or request for proposals or quotations, or (b) not less than five (5) days, exclusive of Saturdays, Sundays, and legal holidays, before the bid opening day or deadline for submitting proposals or quotations, in cases wherein the bid opening date or last date to submit proposals or quotations is 30 or less days after the issuance of the invitation for bids or request for proposals or quotations,\* \* \*"

An opportunity for reconsideration by the Size Appeals Board is provided in section 121.3-6(g)(5) which states that the decision of the Size Appeals Board shall constitute the final administrative remedy of SBA. Armed Services Procurement Regulation (ASPR) 1-703(c)(1) and (2) repeat the provisions of 13 CFR 121.3-8 and 121.3-6(b)(3)(ii), respectively, recited above. When viewed in conjunction with 15 U.S.C. 637(b)(6) and ASPR, the SBA regulations clearly establish it as the sole adjudicator of the size standard issue in question. See 53 Comp. Gen. 434 (1973); National Electrical Contractors Association, B-181511, July 15, 1974, 74-2 CPD 29.

Accordingly, this Office must decline to consider the protest.

  
Paul G. Dembling  
General Counsel